IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 45

BEACON THEATRES, INC., a corporation,

Petitioner,

vs.

THE HONORABLE HARRY C. WESTOVER, Judge of the United States District Court of the Southern District of California, Central Division,

Respondent.

BRIEF FOR THE RESPONDENT.

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Introduction.

In our brief in opposition to Petition for Writ of Certiorari we strongly urged that the posture of the present proceeding—still in its pleading stages only—made it inappropriate for this Court at this time to pass upon the issues presented. Having read the Brief for Petitioner we are doubly confirmed in that view and are convinced that the issue sought to be presented—whether the Petitioner has been improperly deprived of a right to have a jury as opposed to the Court decide an issue of fact—cannot be adequately reviewed on the pleadings alone without the benefit of a trial record.

Statement of Facts.

This is a motion picture case having the seed of its origin in *United States v. Paramount Pictures, Inc., et al.*, 334 U. S. 131, 92 L. Ed. 1260, 68 S. Ct. 915. That decision and the decrees of the District Court which flowed from it held it to be improper for a distributor of motion pictures to grant "clearance" (the practice of licensing a picture to one theatre on condition that it would not be licensed to another theatre until after the lapse of a designated period of time) unless the two theatres were substantially competitive to each other [R. 13-15].

The Petitioner constructed a drive-in theatre eleven miles and twenty minutes driving time from downtown San Bernardino [R. 16] and, contending that it was not substantially competitive to theatres in downtown San Bernardino and other theatres in the "San Bernardino competitive area" [R. 17], demanded from the distributors the right to exhibit their pictures simultaneously with their showing in these other theatres [R. 18] or, as it is expressed in the industry, on a "day and date" exhibition. Petitioner denied that any distributor had the right to license its pictures to these other theatres with clearance over its drive-in [R. 18]. It coupled these contentions with threats that unless it got what it wanted, *i.e.*, the right to simultaneous exhibition, it would sue for treble damages under the antitrust laws [R. 18].

Fox West Coast Theatres Corporation owned and operated the California Theatre in the City of San Bernardino and, as the complaint alleges, had theretofore enjoyed the right of negotiating with the distributors, along with other first run theatres in the competitive area, for a first run exhibition right with clearance over a theatre licensing the same pictu:e for exhibition in the area sub-

sequently [R. 15-16]. This right, the complaint alleges, was a valuable property right and its deprivation would result in substantial damage to Fox West Coast [R. 16].

The complaint proceeds to allege that the threats of treble damage litigation being made by the Petitioner unless it got simultaneous exhibition rights threatened to and had in fact deprived Fox West Coast of its previously enjoyed right to negotiate competitively with other theatres in the area for first run privileges with clearance over the subsequent exhibition of the picture and that it would be irreparably harmed unless the threats of litigation[1] were enjoined pending a determination by the Court whether there in fact existed that competition between the respective theatres for much of the same potential theatre patronage as would justify either theatre in negotiating for a prior run with clearance over the other.[2] [R. 18].

We pause here to make two pertinent observations: The first is that Fox West Coast by its action was seeking to have the Court declare its right to compete with the Petitioner, Beacon Theatres, for the licensing of pictures and that it was Beacon Theatres that was seeking to avoid competition by demanding simultaneous exhibition rights. Second, in its persistent effort to cast this litigation in the role of the "juxtaposition of the parties" cases (a point

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[1]As the opinion of the Circuit Court observes, the complaint sought to enjoin the institution of any action under the antitrust laws as opposed to enjoining the threats of litigation. Clearly, however, if the institution of litigation were enjoined the threats of such suits would be dissipated.

[2]See by way of analogy the language of the court in *Theatre Enterprises v. Paramount Distrib. Corp.*, 346 U. S. 537, 74 S. Ct. 257, 98 L. Ed. 273, at page 540, "Since the Crest is in substantial competition with the downtown theatres a day and date arrangement would be economically unfeasible."

to be developed later), the Petitioner repeatedly infers that the complaint alleges an *anticipation* of Petitioner's ultimate suit, by way of counterclaim, for treble damages (see Pet. Br. pp. 2, 16 and 22). The complaint alleges the exact antithesis (and again we advert to the undesirability of having to decide important questions of procedural law solely on the basis of an interpretation of pleadings); it alleges that because of its threats of antitrust litigation Petitioner had got what it demanded—but was not entitled to—from the distributors, namely licenses for simultaneous exhibition, and that the Plaintiff Fox West Coast was being irreparably harmed thereby. *It would seem a fair hypothesis from the allegations of the complaint that as long as its threats of litigation were succeeding the Petitioner never would in fact make good on those threats and bring its treble damage action under the antitrust laws.*

The complaint alleges a wrongful interference with a preexisting business relationship—the right to negotiate for the license of motion pictures on their first run in the San Bernardino area with a period of clearance over their subsequent exhibition in a competitive theatre.[3] It does

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[3]That this is a valuable and protectible right is made clear from the opinion of the court below [R. 112-116]. See also *International News Service v. Associated Press*, 248 U. S. 215, 236, 39 S. Ct. 68, 63 L. Ed. 211, 219; *Truax v. Raich*, 239 U. S. 33, 37, 36 S. Ct. 7, 60 L. Ed. 131, 133; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 254, 38 S. Ct. 65, 62 L. Ed. 260, 277; *California Grape Control Board v. Calif. Produce Corp.*, 4 Cal. App. 2d 242, 244, 40 P. 2d 846; *Buxbom v. Smith*, 23 Cal. 2d 535, 140 P. 2d 1; *Remillard-Dandini Co. v. Dandini*, 46 Cal. App. 2d 678, 116 P. 2d 641; Annot. 9 A. L. R. 2d 228. Restatement "Torts" Sec. 766. The right to first run exhibition is a valuable property right. *Dade Enterprises v. Wometko Theatre* (Fla.), 160 So. 209; *Montgomery Enterprises v. Empire Theatre*, 204 Ala. 566, 86 So. 880, 887; *Alcazar Amusement Co. v. Mudd & Colley Amusement Co.*, 204 Ala. 509, 86 So. 209.

not deny to Petitioner an equal and correlative right to compete for the license of first run films; what it does assert is that Petitioner is not entitled to take the cream from the top of the pitcher by its insistence upon the right to exhibit the same picture at the same time thereby diluting the potential patronage at both theatres. Accordingly, complainant sought the aid of the court to enjoin, *pendente lite*, the continued threats of suit unless Petitioner got what it wanted and to determine as between the parties whether they were to be free to compete for first run pictures or whether the drive-in was entitled to exhibit the same pictures simultaneously without competition.

The sequel can be told soon enough. Beacon Theatres with its strategy of threats and coercion in imminence of being forestalled, counterclaimed for $300,000 treble damages under the antitrust laws (notwithstanding its drive-in theatre had been open only a few weeks), alleging not an unreasonable grant of clearance between theatres not in substantial competition with each other (which might have been the reverse of the coin to the action for Declaratory Judgment—see Point III below), but alleging in the broadest and most castigating terms a general, comprehensive and continuing conspiracy in restraint of trade between the major exhibitors in the San Bernardino area and the distributors of motion pictures (i) to monopolize first run exhibition, (ii) to refrain from competing between themselves, (iii) to grant preferences to these favored theatres and to protect them from competition, and (iv) to discriminate against Beacon Theatres in the grant of run, clearance and rental terms [R. 39-41].

Adopting the approach used by its counsel in *Institutional Drug Distributors v. Yankwich* (C. A. 9), 249 F. 2d 566, Petitioner demanded a jury trial on all issues.

The Respondent judge, on motion of Fox West Coast, refused to permit this strategy to prejudice its rights to an early declaration as prayed in the complaint[4] and ordered the equitable and declaratory relief issues posed by the complaint and answer thereto separated from the antitrust issues and to be set for trial before the Court at an early date (as contemplated by Rule 57, F. R. C. P.—"The court may order a speedy hearing on an action for declaratory judgment and may advance it on the calendar"). The Court's Order is set forth at R. 52.

In his Response to the Order to Show Cause the Respondent set forth the reasons for his ruling:

> "(3) In separating the issues in said action and in ordering an early trial of the issues raised by the complaint of plaintiff therein, respondent was performing a judicial act within his jurisdiction and discretionary power and was thereby exercising his said judicial discretion and fully performing his judicial functions and duties in accordance with Rules 57 and 42b of the Federal Rules of Civil Procedure. That it was and is the position of respondent that plaintiff may not be deprived of its prerogative of securing an early judicial declaration of its rights by the Court as presented by its complaint for declaratory judgment by the expedient of a Cross-Claim under the anti-trust laws raising wholly different and divergent issues from those raised by the complaint and answer

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[4] The prejudice arising out of a single jury trial on the issues of the complaint and the antitrust counterclaim are set forth on page 77 of the Record. The prejudice incident to Fox West Coast having to introduce the *Paramount* decrees in evidence in its case in chief is recognized in Barron & Holtzoff as constituting good Practice, Sec. 943, p. 666. "Another ground for separate trials is ground for separation; 2 Barron & Holtzoff, Federal Rules and the avoidance of prejudice, as where evidence admissible only on a certain issue may prejudice the jury as to other issues."

thereto and upon which Cross-Claim a jury trial is demanded" [R. 68].

The trial judge was further meticulously careful to preserve to the Petitioner intact its right to a jury trial upon the issues raised by its cross-claim for antitrust violation, striking for that purpose the affirmative defense and allegations of the same antitrust violations from Petitioner's answer to the complaint, to the end that none of the material issues similarly raised by the cross-claim might be prejudged by the Court in the action for injunctive and declaratory relief[5] [R. 52]. The trial judge stated in his Response to the Order to Show Cause:

"(2) Respondent has not and does not propose to deny to defendant a jury trial upon the legal issues presented by its Cross-Claim.

* * * * * * * *

"(4) Contrary to the averment contained in Paragraph XI of petitioner's Petition for Writ of Mandamus, a determination of the issues raised by the complaint in said action will not serve as an adjudication of the basic issue raised by defendant's Cross-Claim, to wit, that of conspiracy to restrain trade which will remain undecided until the trial of the issues raised by said Cross-Claim" [R. 68].

Raising the cry of deprivation of jury trial, the Petitioner petitioned the Court of Appeals for the Ninth Circuit for a Writ of Mandamus, the denial of which by that court is now under review here.

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[5]In this respect, the Order of Separation was more meticulous in preserving the petitioner's full right to a jury trial on all issues of its legal counterclaim than was the order in *Institutional Drug Distributors v. Yankwich* (C. A. 9), 249 F. 2d 566, where the affirmative defense of unclean hands was left for determination by the court without a jury. See dissent of Judge Barnes at p. 571.

It would be an act of supererogation for us here to comment upon what we consider to be the well-reasoned opinion of Judge Pope [R. 102-125]; suffice it to say that the Court left undetermined the principal reason for denying the writ, namely that this is not a proper case in which to permit the extraordinary interlocutory remedy of the All Writs Act (28 U. S. C. Sec. 1651) to be invoked.

Respondent's Contention.

It is the contention of the Respondent before this Court

1. That the question whether the Petitioner was or was not limited in its rights to a trial by jury upon all issues of fact in the pending litigation is inappropriate for consideration by the Court at this time upon a Petition for Writ of Mandamus and before trial on any of the issues of the complaint or counterclaim.

2. That should the Court entertain the merits of the appeal, there is in fact no substantial issue common to both the equitable action and the antitrust counterclaim on which Petitioner will be deprived of a jury trial.

3. That even if there is a common substantial issue between the two phases of this litigation, namely, whether Petitioner's drive-in theatre is or is not in substantial competition with other first run theatres in the San Bernardino area, that is not an issue as to which Petitioner is entitled to a jury determination as a matter of right under the Constitution or laws of the United States.

Inaccuracies of Petitioner's Statement of Questions Presented.

Before expanding upon these three contentions, however, and because it will serve to point up the basic weaknesses of the Petitioner's argument we shall first take issue

with its statement of "The Questions Presented" (Pet. Br. pp. 2-4).

Petitioner says:

> "1. May a Court of Appeals hold * * * that substantial issues of fact raised in a complaint which prays for a declaratory judgment of nonliability (a) * * * which complaint is filed in anticipation (b) of a suit for damages, triable as of right to a jury, shall be tried to the court without a jury * * * because the complaint also alleges threats of that damage suit (c) and irreparable injury resulting therefrom." (Pet. Br. p. 3.)

Respondent observes:

(a) The complaint does not pray for a declaratory judgment of nonliability to the charges of antitrust violations contained in the counterclaim subsequently filed. It prays for a determination by the court that the California Theatre of Fox West Coast and the Petitioner's drive-in are each sufficiently competitive for the same potential pool of theatre patronage as would justify either theatre in seeking to license a picture ahead of and with clearance over the other theatre within the clearance circumscriptions of the *Paramount* decrees. It seeks a determination of Fox West Coast's right to compete for first run pictures against Petitioner's claim to be freed from having to compete.

(b) The complaint was not filed in anticipation of a suit for damages.[6] The complaint alleges threats of litigation and that because of those threats Peti-

[6]To the extent this may present a question of fact, review by this Court on a prerogative writ before trial is clearly premature.

tioner was getting the simultaneous exhibition rights it demanded but was not properly entitled to. This is clearly tantamount to an allegation that so long as Fox West Coast was having inflicted on it the harm from which it sought equitable relief, the Petitioner never would institute its threatened antitrust suit. In the words of the Opinion of the Circuit Court:

"Consistently with the allegations of the complaint defendant, unless enjoined, could go on indefinitely threatening the distributors and the plaintiff with future suits; as long as the threats worked, defendant would have its way and the business of the plaintiff would be seriously limited" [R. 116].

(c) It was not because the complaint alleged threats of a damage suit that the Court of Appeals upheld the separation of the issues; it was because the complaint invoked equity jurisdiction and set forth good grounds for equitable relief that justified the trial judge in exercising his discretion under Rule 42(b) to try the issues raised by the complaint and answer thereto before trying the antitrust counterclaim before a jury. To quote but one sentence of the Circuit Court's Opinion:

"We think these later decisions correctly point out that the Rules of Civil Procedure referred to in the Hollzer case were not designed to make any substantial change in the right to jury trial or to alter any pre-existing right of the trial judge to determine in his discretion whether trial of the suit in equity shall be prior to the submission of the issues in the legal action in any case where, as here, both types of action are presented by the pleadings" [R. 120].

Petitioner says:

"2. Where the basic issues in a complaint seeking an injunction against a threatened jury trial for damages (a) are in essence a defense to or denial of issues (b) in that impending action may a litigant be deprived of a jury trial as to those issues by their prior trial by the court * * *" (Pet. Br. p. 3).

Respondent observes:

(a) There is a purposeful maladroitness in counsel's choice of words: "a complaint seeking an injunction against a threatened jury trial for damages." The complaint, of course, seeks equitable relief against continuing irreparable injury to the plaintiff's business by the Petitioner's wrongful threats of litigation if the distributors should fail to accord it a right to exhibit pictures simultaneously with their first run exhibition in the San Bernardino area.

(b) As is developed at greater length below, the basic issue in the complaint is neither a defense to nor a denial of the charges of malefaction made in the antitrust counterclaim. The issue which the Court is called upon to decide in the complaint is whether the California Theatre and the drive-in are sufficiently competitive each with the other as would justify either theatre in negotiating with the distributors for a prior run of a picture with clearance over the other theatre. It seems obvious from the face of it that if the Respondent Judge on the evidence finds that the theatres are substantially competitive, as Fox West Coast contends, such a finding would aggravate rather than mitigate the charges made in the counterclaim that Fox West Coast and others had conspired to monopolize first run in the San Bernardino area,

had conspired to fix a system of runs and clearances in their favor, and had conspired to discriminate against Petitioner's drive-in. Similarly, if the Respondent Judge should find the theatres not to be substantially competitive, if Fox West Coast has in fact engaged in the wrongful conduct charged in the counterclaim, we fail to see where a finding of non-competitiveness would constitute a defense to such a violation of the penal laws of the United States.

Petitioner says:

"(3) May a Federal Court * * * in a civil action involving joined or consolidated so-called 'equitable' and so-called 'legal' claims, which claims include common substantial questions of fact, deprive either party of a properly demanded jury trial upon those substantial questions of fact by proceeding to a previous disposition of the claim denominated 'equitable' * * *" (Pet. Br. p. 4).

Respondent observes:

That the plaintiff, Fox West Coast, alleging a bona fide grievance, with irreparable injury ensuing therefrom and no adequate remedy at law, may not be deprived of its right to an expeditious trial upon its complaint for declaratory and equitable relief through the defendant's strategy in countering with broad charges of violations of the antitrust laws. The doors of the Federal Courts are not closed to one charged with violating the Sherman Act. (*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 545, 22 S. Ct. 431, 46 L. Ed. 679, 685; *D. R. Wilder Mfg. Co. v. Corn Products Ref. Co.*, 236 U. S. 165, 174, 35 S. Ct. 398, 59 L. Ed. 520, 525; *A. B. Small Co. v. Lamborn & Co.*, 267 U. S. 248, 253, 45 S. Ct. 300,

69 L. Ed. 597), and we shudder to think what would happen to the calendar of the federal courts if the trial court had no discretion to defer and separately try the all-too-frequently asserted countercharge of antitrust violation. As observed by Judge Byers in *Smith, Kline & French Labs. v. International Pharmaceutical Labs.* (D. C. N. Y.), 98 Fed. Supp. 899, 901:

"However, it is possible to gather that the defendants, by way of avoidance, wish to establish the unworthy nature of the plaintiff's conduct and activities according to the defendants' notions, and the courts are open to them for that purpose. It seems to be recognized that such issues are for a jury, as lately declared in Ring v. Spina, 2 Cir., 166 F. 2d 546, but it does not follow that the defendants can thus compel the plaintiff to forego having a court decide the cause which it has proffered. Since the demand for a jury trial seems not to be in terms restricted to specific issues, the court may direct the procedural traffic so as to accomplish the orderly and reasonably prompt progress of the cause.

"The disposition of the motion is as follows:

"Pursuant to Rule 42(b) a separate trial of the counterclaim is deemed to be in furtherance of convenience, and is therefore ordered. The demand for jury trial will be restricted to the issues so presented.

"The cause is to be listed also on the non-jury calendar, to be tried by the court as provided in Rule 38(b) prior to the trial of the issues presented in the counterclaim."

See also the similar decision of Judge Bard in *Society of European Stage Authors and Composers v. WCAU Broadcasting Co.* (D. C. Pa.), 35 Fed. Supp. 460, 461.

I.

Appeal, Not Mandamus, Is the Proper Means to Review Any Alleged Error.

The burden of the Petitioner's appeal to this Court is that it has been deprived of the right to a jury determination upon an issue of fact common to both the equity action and the legal counterclaim for damages for antitrust violation. The Court of Appeals entertained the Petition for Writ of Mandamus on the merits and concluded that the Respondent Judge acted properly within the bounds of his discretion in separating the issues for trial. Accordingly, it denied the Petition for Writ of Mandamus without passing upon the propriety of utilizing an extraordinary writ as a means of interlocutory review.

Regardless of the merits of the Petitioner's grievance we do not conceive an extraordinary writ before judgment and before trial on either proceeding to be an appropriate means of reviewing an interlocutory order of the trial court.

The All Writs Act, 28 U. S. C. Sec. 1651, provides:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

It is difficult to comprehend in what manner the issuance of a Writ of Mandamus would aid the jurisdiction of the Court of Appeals where, if the Respondent Judge was in error in denying a jury trial upon any substantial common issue of fact, that error may be reviewed on appeal from final judgment, as was in fact done in each of the thirteen Appeals Court cases cited in footnote 12, page 22 of Petitioner's Brief.

While strong argument could be made that the Court is actually without power to issue a Writ of Mandamus where the error, if any there be, is reviewable on appeal from final judgment,[7] we prefer to address ourselves to the inappropriateness of this extraordinary remedy in the case at bar.

The Petitioner represents to the Court that there is a substantial issue of fact, to-wit the degree of competition

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[7]Judge Magruder of the First Circuit in *In re Chappell & Co.*, 201 F. 2d 343, 346; and in *In re Previn*, 204 F. 2d 417, 418, concludes that the issuance of mandamus to reverse a denial of a jury trial in no wise "aids" the jurisdiction of the court of appeal and is an improper use of the All-Writs section of the Judicial Code. *Black v. Boyd*, decided by the Sixth Circuit, and in which Mr. Justice Stewart participated, 248 F. 2d 156, presents an interesting discussion of the *power* of the Court of Appeals to issue a writ of mandamus where a jury trial has been denied upon a legal counterclaim to an action in equity and questions whether the 1948 recodification into Section 1651(a) of the Judicial Code of the former Section 342 may not have rendered *Ex parte Simons*, 247 U. S. 231, 38 S. Ct. 497, 62 L. Ed. 1094, of historical interest only. Of double interest in the case is the fact that while the court concluded that it had power to mandamus the trial court to restore the legal counterclaim to the jury calendar, it had no power to direct the trial court against separating the issues and trying the equity suit first to the court without a jury. In a subsequent *per curiam* proceeding reported in 251 F. 2d 843, the court said in denying a subsequent application for leave to file petition for writ of mandamus, p. 844:

> "The Court is of the opinion that the order of December 27, 1957, was one within the discretion of the District Judge. Rule 42(b), Rules of Civil Procedure, 28 U. S. C. A.; Big Cola Corporation v. World Bottling Co. (6th Cir.), 134 F. 2d 718, 723. Although the writ of mandamus is available to require a court to make a ruling, it will not issue for the purpose of directing the Court to rule in a specific way. Jewell v. Davies, 6 Cir., 192 F. 2d 670, 673. If the District Court has misconstrued our prior directive in Black v. Boyd, supra, 248 F. 2d 156, any error can be corrected by an appeal from the final judgment, if and when one should be entered adverse to the petitioner. Walker v. Brooks, 6 Cir., 251 F. 2d 555. The circumstances are not such as to justify the use of the writ of mandamus as a substitute for an appeal. Massey-Harris-Ferguson, Limited, v. Boyd, 6 Cir., 242 F. 2d 800, 803, certiorari denied, 355 U. S. 806, 78 S. Ct. 48, 2 L. Ed. 50."

between the theatres involved, common to both the action for equitable and declaratory relief and the antitrust counterclaim. Only a trial on the facts can determine whether that fact issue is in truth common to both causes and is material to both. The complaint alleges that succumbing to the threats of antitrust litigation, the distributors have deprived Fox West Coast and its California Theatre "of the right to negotiate for first run in the San Bernardino area and to negotiate for clearance over theatres in competition with plaintiff's said theatre upon first run, including defendant's Bel-Air Drive-In Theatre" [R. 18]. If that allegation is proven and no clearance was in fact granted the California Theatre over the drive-in, the issue of competition between the theatres would be immaterial in the antitrust action. Moreover, as we have shown above, if in fact Fox West Coast and the distributors have conspired together to monopolize first run, to discriminate against the drive-in and to refuse it an opportunity to compete for the prior run, then whether the theatres are competitive or not is of no consequence; certainly, it is no defense to the wrongs charged in the counterclaim.

Hence we say that until there is a trial record to review, it is wholly premature on the pleadings alone to attempt to determine whether Petitioner has actually been or will be deprived of a jury trial upon any significant issue in its counterclaim.

Again it should be noted that Petitioner's contention that it is being deprived a jury trial upon a substantial common issue of fact is directly controverted by the trial judge who, in his response to the Order to Show Cause, stated:

"(4) Contrary to the averment contained in Paragraph XI of petitioner's Petition for Writ of Man-

damus, a determination of the issues raised by the complaint in said action will not serve as an adjudication of the basic issue raised by defendant's Cross-Claim, to wit, that of conspiracy to restrain trade which will remain undecided until the trial of the issues raised by said Cross-Claim" [R. 68].

Additionally, Petitioner represents to the Court that Fox West Coast brought its action for equitable and declaratory relief in anticipation of and as an anticipatory defense to the antitrust counterclaim. We say the complaint alleges the exact contrary [R. 18]—that as long as Petitioner's coercive threats of litigation were working it had no intention of instituting an action under the antitrust laws.[8] At best, whether the remedy at law was adequate when the complaint was filed, because the institution of the antitrust suit may have been imminent and its imminence known to the plaintiff, can only be determined when the evidence is in.[9]

We urge, therefore, that whether or not power lay in the Court of Appeals to grant the writ, this is not such a case as would justify the granting of a prerogative writ when appeal from the final judgment can present the question in more definitive and intelligent form.

The very restricted limitations which the court has thrown about the extraordinary remedy of mandamus needs no great elaboration. See Rule 30 of the Supreme Court Revised Rules. The Writ has generally been confined to cases of an abnegation of jurisdiction by a lower

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[8]The Court of Appeals agrees with us. [R. 116.]

[9]The importance of the pendency or imminence of the action at law upon the adequacy or inadequacy of the remedy at law is illustrated in *Atlas Life Insurance Co. v. Southern*, 306 U. S. 563, 572, 59 S. Ct. 657, 83 L. Ed. 987, 993.

court (*La Buy v. Howes Leather Co.*, 352 U. S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290) or inappropriate exercise of jurisdiction (*U. S. Alkali Export Ass'n v. United States*, 325 U. S. 196, 65 S. Ct. 1120, 89 L. Ed. 1554) and never was a vehicle for controlling and directing the discretionary power of the court acting within its jurisdiction.

In *Parr v. United States*, 351 U. S. 513, 76 S. Ct. 912, 100 L. Ed. 1377, this court stated the bounds for the issuance of extraordinary writs to review interlocutory orders, page 520 of 351 U. S.

> "Such writs may go only in aid of appellate jurisdiction, 28 U. S. C. §1651. The power to issue them is discretionary and it is sparingly exercised. Rule 30 of the Revised Rules of this Court and the cases cited therein. This is not a case where a court has exceeded or refused to exercise its jurisdiction, see Roche v. Evaporated Milk Asso., 319 U. S. 21, 26, 89 L. ed. 1185, 1190, 63 S. Ct. 938, nor one where appellate review will be defeated if a writ does not issue, cf. Maryland v. Soper, 270 U. S. 9, 29, 30, 70 L. ed. 449, 456, 457, 46 S. Ct. 185. Here the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals. Roche v. Evaporated Milk Asso., supra (319 U. S. at p. 30)."

Bankers Life and Casualty Co. v. Holland, 346 U. S. 379, 74 S. Ct. 145, 98 L. Ed. 106, clearly demonstrates the impropriety of reviewing on petition for a writ discretionary action taken by a trial judge. That was an action for treble damages under the antitrust laws brought in the Southern District of Florida naming as defendants, in ad-

dition to residents of that district, the insurance commissioner of Georgia, who was personally served in Florida. The trial court after holding that it had jurisdiction of the action and of the commissioner held that venue was not properly laid as to the commissioner and ordered the action as to him severed and transferred to the Northern District of Georgia. Petitioner then sought a Writ of Mandamus from the Court of Appeals to compel the vacation of the order of severance and transfer. The Supreme Court affirmed the denial of the writ, saying, page 382 of 346 U. S.:

> "The All Writs Act grants to the federal courts the power to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 USC §1651-(a). As was pointed out in Roche v. Evaporated Milk Asso., 319 U. S. 21, 26, 87 L. ed. 1185, 1190, 63 S. Ct. 938 (1943), the 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Here, however, petitioner admits that the court had jurisdiction both of the subject matter of the suit and of the person of Commissioner Cravey and that it was necessary in the due course of the litigation for the respondent judge to rule on the motion. The contention is that in acting on the motion and ordering transfer he exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. * * * Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power, Roche v. Evaporated Milk Asso. (US) supra, and is review-

able upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in De Beers Consol. Mines v. United States, 325 U. S. 212, 217, 89 L. ed. 1566, 1572, 65 S. Ct. 1130 (1945). This is not such a case.

"It is urged, however, that the use of the writ of mandamus is appropriate here to prevent 'judicial inconvenience and hardship' occasioned by appeal being delayed until after final judgment. But it is established that the extraordinary writs cannot be used as substitutes for appeals. Ex parte Fahey, 332 U.S. 258, 260, 91 L. ed. 2041-2043, 67 S. Ct. 1558 (1940), even though hardship may result from delay and perhaps unnecessary trial, United States Alkali Export Asso. v. United States, 325 U.S. 196, 202, 203, 89 L. ed. 1554, 1560, 1561, 65 S. Ct. 1120 (1945); Roche v. Evaporated Milk Asso., supra (319 U.S. at 31); and whatever may be done without the writ may not be done with it. Ex parte Rowland, 104 U.S. 604, 617, 26 L. ed. 861, 866 (1882). *We may assume that, as petitioner contends, the order of transfer defeats the objective of trying related issues in a single action* and will give rise to a myriad of

legal and practical problems as well as inconvenience to both courts; but Congress must have contemplated those conditions in providing that only final judgments are reviewable. Petitioner has alleged no special circumstances such as were present in the cases which it cites.

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"We adhere to the language of this Court in Ex parte Fahey, supra (332 U.S. at 259, 260):

"'Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. . . . As extraordinary remedies, they are reserved for really extraordinary causes.'" (Italics ours.)

It is not without interest to note that in both *Ex parte Simons*, 247 U. S. 231, 38 S. Ct. 497, 62 L. Ed. 1094, and *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 44 S. Ct. 446, 68 L. Ed. 912, the petitioner's entire case and not an isolated issue of fact was being taken from the jury to which the court held they were respectively entitled; in *Ex parte Peterson*, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919, while the court entertained the petition for the writ it denied it when the trial court took not the entire case from the jury but rather referred a complicated accounting to an auditor to report on it to the court and jury.

Other decisions of this court cited in footnote 1 on page 3 of Petitioner's Brief involved not a deprivation of jury

trial but either a wrongful assumption of jurisdiction by the trial court—*U. S. Alkali Export Assn. v. United States*, 325 U. S. 196, 65 S. Ct. 1120, 89 L. Ed. 1554; *Ex parte Williams*, 277 U. S. 267, 48 S. Ct. 523, 72 L. Ed. 877—or a refusal to assume jurisdiction—*Los Angeles Brush Mfg. Co. v. James*, 272 U. S. 701, 47 S. Ct. 286, 71 L. Ed. 481; *McCullough v. Cosgrave*, 309 U. S. 634, 60 S. Ct. 703, 84 L. Ed. 992; *La Buy v. Howes Leather Co.*, 352 U. S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290.

As was said in *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 63 S. Ct. 938, 87 L. Ed. 1185, where the granting of a Writ of Mandamus was reversed, page 26 of 319 U. S.:

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. Ex parte Peru, supra (318 U.S. 578, 581, ante, 1914, 1016, 63 S. Ct. 793), and cases cited; Ex parte Newman, 14 Wall. (U.S.) 152, 165, 166, 169, 20 L. ed. 877, 879, 880; Ex parte Sawyer, 21 Wall. (U.S.) 235, 238, 22 L. ed. 617, 618; Interstate Commerce Commission v. United States, 289 U.S. 385, 394, 77 L. ed. 1273, 1278, 53 S. Ct. 607. Even in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal. Ex parte Harding, 219 U.S. 363, 369, 55 L. ed. 252, 254, 31 S. Ct. 324, 37 LRA (N.S.) 392; cf. Stoll v. Gottlieb, 305 U.S. 165, 83 L. ed. 104, 59 S. Ct. 134, 38 Am. Banker Rep. (N.S.) 76; Treinies v. Sunshine Min. Co., 308 U.S. 66, 84 L. ed. 85, 60 S. Ct. 44."

It was on this ground the court distinguished the *Simons, Peterson* and *Skinner & Eddy Corporation* cases, saying page 32 of 319 U. S.:

"The decisions of this Court on which respondents especially rely are not applicable here. In Ex parte Simons, 247 U.S. 231, 62 L. ed. 1094, 38 S. Ct. 497, the writ directed the district court to set aside its order transferring to the equity docket a case plainly triable at law by jury. The district court's order was regarded by this Court 'as having repudiated jurisdiction' of the suit. In Ex parte Peterson, 253 U.S. 300, 64 L. ed. 919, 40 S. Ct. 543, in which the writ was sought similarly to compel the district court to set aside its order referring the cause to an auditor, the application was denied because the order was held not to preclude a jury trial. And in Re Skinner & E. Corp., 265 U.S. 86, 68 L. ed. 912, 44 S. Ct. 446, the writ prohibited the Court of Claims from exercising jurisdiction, contrary to statute, over a suit which it had previously dismissed. There its assumption of jurisdiction would have deprived the litigants of trial by jury in a state court where an action against an agency of the United States involving the same issue was pending. Thus in the two cases in which the writ was granted, it was issued in aid of the appellate jurisdiction of this court to compel an inferior court to relinquish a jurisdiction which it could not lawfully exercise or to exercise a jurisdiction which it had unlawfully repudiated. Cf. Ex parte Peru, 318 U.S. 578, ante, 1914, 63 S. Ct. 793, supra. In the present case the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power. In issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress,

which has restricted that court's appellate review to final judgments of the district court."

From the foregoing decisions of this Court the conclusion seems compelled that mandamus is not the appropriate or proper means of determining what may be the limits imposed by Rule 38(a) upon the trial court's discretion under Rules 39(a)(2) and 42.

Whatever occasion may have existed in the past to tempt the Court to broaden the narrow limitations it has placed around the issuance of prerogative writs to review interlocutory orders of a trial court is now set at rest by the enactment on September 2, 1958, of the Interlocutory Appeals Act (Public Law 85—919 quoted in the Appendix). This places the review of important interlocutory orders before final judgment not in the hands of the advocate where it can be used for delay or to impede the orderly conduct of the court's business but where it belongs, in the discretion of the trial court and of the Court of Appeals.

The present case presents a vivid illustration of the vice of permitting the use of extraordinary writs. The complaint praying for a declaratory judgment and equitable relief and alleging irreparable injury was filed on October 31, 1956 [R. 103]. A motion to dismiss the complaint was denied January 14, 1957 [R. 21]. Thereafter the counterclaim under the antitrust laws and demand for a jury trial on all issues of the complaint and counterclaim was filed and in March 1957 the demand for a jury trial on the complaint was stricken, the issues ordered separated and the complaint and answer put on the calendar of April 1, 1957, for setting for trial [R. 52]. Thence ensued the present delay of more than a year and a half wherein Petitioner has sought to invoke the extraordinary

remedy of Writ of Mandamus. We do not believe that dilatory tactics of this character should be encouraged by the court countenancing the present petition.

II.

There Is No Common Substantial and Material Issue Between the Antitrust Counterclaim on Which Jury Trial Has Been Preserved and the Complaint for Declaratory and Equitable Relief.

There is a thoroughly well established line of decisions, mostly insurance and patent cases, which Professor Moore has facilely termed "juxtaposition of the parties" cases, wherein what would constitute a defense to an action at law is sought to be determined in advance and in anticipation thereof in a proceeding for declaratory judgment or equitable relief. With virtually complete unanimity the courts have held that one may not by reversing the normal procedure deprive his adversary of his right to a jury trial.[10] With these cases we have absolutely no quarrel; we wholeheartedly concede their soundness. We do not, however, concede that this case falls within their ambit for two separate and distinct reasons: (i) the juxtaposition of the parties cases are those wherein the issue presented in the equity or declaratory relief action would be determinative of the defendant's potential action at law;[11] the issue of competition between the theatres

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[10]Judge Healy in *Dickinson v. Gen. Acc. Fire & Life Assur. Co.* (C. A. 9), 147 F. 2d 396, 397.

[11]Thus see: (*American*) *Lumbermens Mut. Cas. Co. v. Timms and Howard* (C. A. 2), 108 F. 2d 497 (non-coverage); *Pacific Indemnity v. McDonald* (C. A. 9), 107 F. 2d 446 (fraud and collusion between insured and injured party); *Hargrove v. American Cent. Ins. Co.* (C. A. 10), 125 F. 2d 225 (fraud); *Dickinson v. General Accident Fire and Life Assur. Corp.* (C. A. 9), 147 F. 2d 396 (failure of insured to give written notice).

here would be determinative of little or nothing in the counterclaim for antitrust violation. (ii) There is an exception to the "juxtaposition of the parties" principle as widely observed as the principle itself; that is where the issue presented in the initiating action is not and may not become available as a defense to a subsequent action at law, then, as was adjudged by the Court of Appeals in the case at bar, the plaintiff's remedy at law is inadequate and the proceeding being equitable the defendant is not entitled to jury trial.

We proceed to a discussion of the first point here and to the second in Point III *infra*.

The fact issue in the action for equitable and declaratory relief is whether the Fox West Coast California Theatre and the Petitioner's drive-in are substantially competitive with each other. The fact issue in the counterclaim is whether the cross-defendants and co-conspirators therein named conspired together in restraint of trade and to monopolize in the manner alleged in the counterclaim [R. 39-41]. Absent conspiracy, whether or not the distributors licensed a single first run picture to Petitioner's drive-in, be it in substantial competition or not in substantial competition with other first run theatres in the San Bernardino area, Petitioner will not have made out a case on its counterclaim. As this Court said in *Theatre Enterprises v. Paramount Distrib. Corp., supra*,

> "The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express" (p. 540 of 346 U. S.) and further on p. 541 "but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

If Petitioner on its counterclaim should fail to prove conspiracy the issue of competition between the theatres is meaningless.

If Petitioner on the other hand succeeds in proving the allegations of its counterclaim, the conspiracy to monopolize first run and to discriminate against the new drive-in, the existence or non-existence of competition between the theatres would exculpate none of the alleged wrongdoers, although if there was an absence of competition between the drive-in and the other first run theatres, as Petitioner contended in its answer to the complaint [R. 29], it might have some difficulty proving injury to its business.

We assert, therefore, that the question of competition between the theatres is not a common substantial issue of fact to the equity complaint and the legal counterclaim within the meaning of that term in *Leimer v. Woods* (C. A. 8), 196 F. 2d 828, 836.[12]

No Prejudice Can Arise From the Respondent's Pr or Determination of the Issue of Competition Be ween the Theatres.

Not only is the issue of substantial competition not a common material issue to the two actions but analysis shows that Petitioner can suffer no harm by the predetermination of that issue by the court rather than by the jury. Suppose, *arguendo*, that the Respondent Judge finds in the equity suit that there is substantial competition between Petitioner's drive-in and the Fox West Coast California Theatre and so instructs the jury in the subsequent antitrust trial. If Petitioner can prove the alle-

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[12]Note that in the *Leimer* case there was but a single fact issue, whether the landlord had violated the ceiling rent regulation.

gations of its counterclaim that Fox West Coast, the other theatre owners named therein and the distributors of motion pictures have in fact conspired to keep first run pictures away from the drive-in, to monopolize first run in the San Bernardino area and to discriminate against the drive-in, then surely Petitioner has been materially benefited from the Court's prior finding of the existence of substantial competition between the theatres and its burden of proving the injurious impact of the wrongful conduct upon its business is to that extent lessened.

If on the other hand the Respondent Judge finds that the theatres are not substantially competitive and so instructs the jury, the Petitioner will not be prejudiced in his antitrust trial to the jury because forsooth the alleged conspiracy to favor the Fox West Coast theatre, to give it a monopoly on first run and to deprive the non-competitive drive-in theatre of first run pictures would be but the more unreasonable and without any semblance of economic or business justification.

Whichever way the declaratory judgment goes the Petitioner will be aided before the jury *provided always, of course, that Petitioner can make good on its charges of an unlawful conspiracy in restraint of trade, a wrongful conspiracy to give Fox West Coast and the other accused theatre owners preferential treatment and a monopoly on first run at the expense of the Petitioner.*

There is still another analysis which lays bare the pedestal of sand on which Petitioner's case is constructed. After final judgment adverse to it on its antitrust counterclaim let us assume that the Petitioner seeks to claim error because of the separation of the issues and the trial court's prejudgment of the question of substantial competition

between the theatres. From the jury's verdict adverse to it there is only one conclusion to be drawn and that is that Petitioner has failed to prove any conspiracy in restraint of trade. Where would lie the reversible error in the court's prejudgment respecting competition? Whichever way the declaratory judgment went the Petitioner has still failed to sustain its burden of proving the alleged unlawful conspiracy in restraint of trade, *i.e.*, the conspiracy to favor Fox West Coast and the other theatres at the expense of the drive-in. If the jury could have found the theatres were competitive when the trial judge found they were not, would its verdict have been any different if by necessary hypothesis the jury found against the alleged conspiracy? Or contrariwise, if the jury could have found the theatres were non-competitive when the trial judge decided they were competitive, would its verdict have been altered? To answer yes to that question would be to say that all a motion picture exhibitor has to prove to recover treble damages under the antitrust laws is that he was not granted the right to exhibit a picture simultaneously with a non-competitive theatre. Such is not the law.[18] Concert of action or unlawful conspiracy must

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[18] *Fox West Coast Th. Corp. v. Paradise Th. Building Corp.* (C. A. 9)—not yet reported:

> "If one thing is more certain than any other in this field, it is that Paradise had no right as such to demand licensing on a seven-day basis."

Franchon & Marco, Inc. v. Paramount Pictures, Inc. (C. A. 9), 215 F. 2d 167, 169:

> "No rule of law required appellees to give Baldwin a preferred position irrespective of conditions at the time of filing of this case."

Loew's, Inc. v. Cinema Amusements (C. A. 10), 210 F. 2d 86, 92:

> "One of such rules is that the producers and distributors of motion picture films are not required to license their products

still be proved (*Theatre Enterprises v. Paramount Distrib. Corp., supra*).

Deprivation of a jury trial upon the issue of competition between the theatres involved is a hollow cry, without substance or real meaning when analyzed against the allegations of the antitrust counterclaim.

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to every exhibitor who desires or requests them. Neither are they under duty to accord to an exhibitor any particular run—first or otherwise—of films which are furnished him. An exhibitor does not have the absolute right to compel producers and distributors to furnish him films or to give him the privilege of exhibiting them on the basis of any specified run. William Goldman Theatres, Inc., v. Loew's, Inc., 3 Cir., 150 F. 2d 738, reaffirmed on a subsequent appeal, 3 Cir., 164 F. 2d 1021, certiorari denied, 334 U. S. 811, 68 S. Ct. 1016, 92 L. Ed. 1742; Chorak v. RKO Radio Pictures, 9 Cir., 196 F. 2d 225, certiorari denied, 344 U. S. 887, 73 S. Ct. 186."

Paramount Film Distributing Corp. v. Applebaum (C. A. 5), 217 F. 2d 101, 124:

"Despite the multitude of decisions against film distributors, it is still the law that ordinarily a distributor has the right to license or refuse to license his film to any exhibitor, pursuant to his own reasoning, so long as he acts independently. * * * The three instructions complained of in effect told the jury that every distributor of films *must as a matter of law* accept all equally suitable exhibitors as customers and *must* treat them all equally. Such a statement not only overlooks the peculiarities of the motion picture exhibiting business, but it also obviously conflicts with the settled law to the contrary."

Chorak v. RKO Radio Pictures (C. A. 9), 196 F. 2d 225, 228:

"As pointed out in Fanchon & Marco v. Paramount Pictures, Inc., *supra*, 100 F. Supp. at page 90 an exhibitor does not have the right to *compel* a motion picture producer to give him a preferred run—this because as a very practical matter the motion picture industry could not operate under a system of simultaneous releases. This obvious fact underlies the doctrine that clearances and runs are not illegal *per se*."

United States v. Colgate & Co., 250 U. S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 997.

Times-Picayune Pub. Co. v. United States, 345 U. S. 594, 625, 73 S. Ct. 872, 97 L. Ed. 1277, 1299.

III.

Even Though Competition Between the Theatres Be a Substantial Common Issue Petitioner Is Not Entitled to a Jury Trial on That Issue.

In upholding the exercise of its discretion by the trial court to try the equitable and declaratory judgment issues ahead of the antitrust counterclaim, the Court of Appeals did so upon the ground that the complaint demonstrated the inadequacy of any legal remedy and plaintiff having pleaded a claim for equitable relief, the Petitioner-defendant was not entitled to a jury trial thereon and did not become so entitled by subsequently filing its legal counterclaim for treble damages.

At this point it may be well to restate a few basic precepts:

(i) The Federal Rules of Civil Procedure were designed to preserve intact but not otherwise to enlarge upon a party's right to jury trial. 5 Moore Fed. Practice (2nd Ed), Sec. 38.07, p. 39-42.

(ii) There is no right to jury trial in a suit in equity. *United States v. Louisiana,* 339 U. S. 699, 706, 70 S. Ct. 914, 94 L. Ed. 1216, 1220; 5 Moore Fed. Practice (2nd Ed.), Sec. 38.11(6), p. 115 *et seq.*

(iii) Where certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried. F. R. C. P. Rule 39(a)(2); *Liberty Oil Co. v. Condon Nat. Bank,* 260 U. S. 235, 43 S. Ct. 118, 67 L. Ed. 232 (cited in support of the Rule in the Advisory Committee notes).

We think it clear that prior to the adoption of the Federal Rules Petitioner would not have been entitled to a jury trial upon the issues posed by the complaint for equitable and declaratory relief. The basic nature of the issue posed (*cf.* 5 Moore Fed. Practice (2nd Ed.), Sec. 38.16, p. 148 *et seq.*) was whether Fox West Coast had the right to continue to negotiate with distributors for first run with clearance over the new drive-in theatre free from the coercion and threats of antitrust litigation if it did so. No money damages were claimed and irreparable injury and inadequacy of remedy at law were alleged. Moreover, as above demonstrated, the existence or non-existence of substantial competition between the California Theatre and the drive-in would have been no defense to the antitrust counterclaim subsequently filed.[14]

Most closely comparable to the present are those cases in which an insurer's remedy at law is inadequate either because loss has not yet occurred or the incontestible period may run before suit is instituted on the policy.

5 Moore Fed. Practice (2nd Ed.), Sec. 38.16, p. 158:

> "Where, however, liability under the policy has not matured, as where the insured is still living, and the insurer brings an action for rescission and cancellation within the time permitted by the incontestable clause, the issue is equitable. It will be noted that the insurer had no remedy at law."

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[14] *Cf. City of Morgantown v. Royal Ins. Co.* (C. A. 4), 169 F. 2d 713, affirmed on other grounds 337 U. S. 254, 69 S. Ct. 1067, 93 L. Ed. 1347, where reformation of the insurance policy was sought after loss. Judge Parker pointed out that unlike fraud in the procurement which could be pleaded as a defense to an action on the policy, reformation could be had only in equity, there was no adequate remedy at law, and hence the insured was not entitled to jury trial.

The distinction made between the adequacy or inadequacy of the remedy at law as a criterion for determining whether the cause is in equity or at law is best illustrated by comparing two decisions of this court: *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440, and *American Life Insurance Co. v. Stewart*, 300 U. S. 203, 57 S. Ct. 377, 81 L. Ed. 605.[15] In the former case where the insured had died and action had been commenced on the policy, the court held that fraud in the procurement was available as a defense and hence the remedy at law was adequate. The opinion of Mr. Chief Justice Hughes states, page 384:

> "The instant case is not one in which there is resort to equity for cancellation of the policy during the life of the insured and no opportunity exists to contest liability at law. Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms is to become incontestable. Here, on the death of the insured, an action at law was brought on the policy, and the defendant had opportunity in that action at law, and before the policy by its terms became incontestable, to contest its liability and accordingly filed its affidavit of defense. * * * In such a case, the defense of fraud is completely available in the action at law and a bill in equity would not lie to stay proceedings in that action in order to have the defense heard and determined in equity. Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 623, 20 L. ed. 501, 503; New

[15] See also annotations on the subject in 73 A. L. R. 1529 and 114 A. L. R. 1275.

York L. Ins. Co. v. Bangs, 103 U.S. 780, 782, 26 L. ed. 608, 609; Cable v. United States L. Ins. Co. 191 U.S. 288, 305, 48 L. ed. 188, 193, 24 S. Ct. 74; American Mills Co. v. American Surety Co., 260 U.S. 360, 363, 67 L. ed. 306, 308, 43 S. Ct. 149; New York L. Ins. Co. v. Marshall (C.C.A. 5th) 23 F. (2d) 225; New York L. Ins. Co. v. Miller (C.C.A. 8th) 73 F. (2d) 350, supra."

In *American Life Ins. Co. v. Stewart, supra,* the insured died three months after obtaining the insurance in question and the company brought suit in equity within the incontestable period to cancel the policies for fraud in the procurement. Thereafter the beneficiaries brought action at law to recover on the policies. Mr. Justice Cardozo and a unanimous court held that the action properly proceeded in equity and that the subsequent suit at law did not oust the equity jurisdiction once attached. The court said, page 212:

"If the policy is to become incontestable soon after the death of the insured, the insurer becomes helpless if he must wait for a move by some one else, who may prefer to remain motionless till the time for contest has gone by. A 'contest' within the purview of such a contract has generally been held to mean a present contest in a court, not a notice of repudiation or of a contest to be waged thereafter. See, e.g., Killian v. Metropolitan L. Ins. Co., 251 N.Y. 44, 48, 166 N.E. 798, 64 A.L.R. 956; New York L. Ins. Co. v. Hurt (C.C.A. 8th) 35 F. (2d) 92, 95; Harnischfeger Sales Corp. v. National L. Ins. Co. (C.C.A. 7th) 72 F. (2d) 921, 922. Accordingly an insurer, who might otherwise be condemned to loss through the mere inaction of an adversary, may assume the offensive by going into equity and there

praying cancellation. This exception to the general rule has been allowed by the lower Federal courts with impressive uniformity.

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"Here the insurer had no remedy at law at all except at the pleasure of an adversary. There was neither equality in efficiency nor equality in certainty nor equality in promptness. 'The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.' Bank of Kentucky v. Stone (C.C.) 88 F. 383, 391; cf. Lincoln Nat. L. Ins. Co. v. Hammer (C.C.A. 8th) 41 F. (2d) 12, 16."

Petitioner's attempt to bring the present litigation within the principle of the *Enelow* case (Pet. Br. p. 31) must necessarily fail for the dual reasons that (i) a determination that each of two theatres are sufficiently competitive as would justify either in negotiating for a run ahead of and with clearance over the other would not constitute a defense to the broad charges of antitrust violation nor even necessarily be determined in the antitrust counterclaim—hence the filing of the counterclaim did not supply the adequate remedy at law required by the *Enelow* decision; and (ii) the adequacy of the remedy at law is to be determined when the suit in equity is commenced. As the Court of Appeals cogently observed [R. 116] there was no assurance that an antitrust action would ever be brought [in fact, the allegations of the complaint make it clear that as Petitioner's threats were successful suit by the Petitioner was most unlikely—R. 18], hence distinguishing the case from *Phoenix Mut. Life Insurance Co. v. Bailey,* 13 Wall. 616, 20 L. Ed. 501, where death had occurred and the obligation under the policy became fixed when the bill in equity for cancella-

tion was filed[16] and from *Di Giovanni v. Camden Fire Ins. Co.*, 296 U. S. 64, 56 S. Ct. 1, 80 L. Ed. 47, where the fire had happened and proof of loss been filed before the insurance company commenced its action.

Although from what has been said it is apparent that the filing of the antitrust counterclaim never did furnish an adequate remedy at law, it is equally well settled that the adequacy of the remedy at law is to be determined when the suit in equity is commenced and is not affected by subsequent events. *American Life Ins. Co. v. Stewart, supra,* where the court said, at page 215:

> "The argument is made that the suits in equity should have been dismissed when it appeared upon the trial that after the filing of the bills, and in October, 1932, the beneficiaries of the policies had sued on them at law. But the settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter. Dawson v. Kentucky Distilleries & Warehouse Co., 255 U.S. 288, 296, 65 L. ed. 638, 646, 41 S.Ct. 272; Lincoln Nat. L. Ins. Co. v. Hammer, supra; New York L. Ins. Co. v. Seymour (C.C.A. 6th) 45 F. (2d) 47, 73 A.L.R. 1523, supra."

To the same effect are *Spector Motor Service v. O'Connor*, 340 U. S. 602, 605, 71 S. Ct. 508, 95 L. Ed. 573, 577; *Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, 296, 41 S. Ct. 272, 65 L. Ed. 638, 647; *Geddes v. Anaconda Copper Mining Co.*, 254 U. S. 590, 593, 41 S. Ct. 209, 65 L. Ed. 425, 430; 19 Am. Jur. "Equity", Sec. 105, p. 112.

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[16]In the *Phoenix* case it does not appear that an incontestable clause was involved, thus differentiating it from *American Life v. Stewart*.

As the Petitioner would have had no right to a jury trial on the issues raised by the complaint under the separation of law and equity prior to the adoption of the Federal Rules he has not been deprived of the right to a jury trial by the exercise of his discretion by the Respondent Judge to separate the isues under Rule 42(b).

Even Without the Equitable Issues in Paragraph XII of the Complaint the Right to a Jury Trial Thereon Is at Least Dubious.

The opinion of the Court of Appeals places much emphasis upon the equitable issues and indicates that without them the decision might have been governed by the *McDonald* and *Dickinson* cases [R. 110]. We think this is an oversimplification and that it presupposes that the declaratory judgment allegations posed legal issues triable to a jury. Actually an action to declare whether there exists substantial competition between two theatres within the circumscriptions of prior equity decrees (*United States v. Paramount Pictures, Inc., et al.*) is certainly not a "suit at common law" nor in the nature of one. No damages were asked and the fact question sought to be determined was for the purpose of interpreting prior injunctive decrees entered against the principal distributors of motion pictures by another court in the light of the situation which presented itself in the San Bernardino area where the Petitioner built its drive-in theatre and made its demands for simultaneous exhibition rights. We sincerely question whether on the declaratory judgment allegations alone a jury trial could properly have been demanded.

Comparable is the statement of Mr. Chief Justice Hughes in *National Labor Relations Board v. Jones &*

Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, to a contention that the finding of unfair labor practices by the National Labor Relations Board and order of reinstatement with back wages violated the defendant's right to jury trial (p. 48 of 301 U. S.):

> "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit."

Nor would a jury trial of those declaratory judgment issues have become necessary when the antitrust counterclaim was filed on any "juxtaposition of the parties" theory. Had the counterclaim alleged simply an unreasonable restraint in that the distributors were granting the Fox theatre clearance over the drive-in when the theatres were not in competition with each other, a *"Dickinson"* or *"McDonald"* situation might well have been presented. But on its face the counterclaim under the antitrust laws does not allege an improper grant of clearance between non-competitive theatres. It alleges a conspiracy: (1) "To fix a system of runs and clearances" in the San Bernardino area; (2) To allocate pictures; (3) To refrain from competition; (4) To impose clearance against independent outsiders for the purpose of protecting a first run monopoly; and (5) To discriminate against independent theatres, including Petitioner's drive-in [R. 39-41]. There is not a word in the broad charges of the counterclaim to indicate that the source of Petitioner's grievance is the

grant of unreasonable clearance over non-competitive theatres or that this occasioned any part of its $100,000 injury.

We have, therefore, on the pleadings, excluding all allegations sounding strictly in equity, not a "juxtaposition of the parties" case or a request for an adjudication of non-liability by a prospective defendant but what from the pleadings themselves appear to be largely, if not totally, unrelated issues.

We say, therefore, that ignoring the strictly equity aspects of the complaint, Petitioner has still failed to demonstrate its right to a jury trial upon the fact question of substantial competition.

The Proper Criteria for Determining the Limitations Upon the Trial Court's Discretion as to the Order of Trial.

If any one thing is to be made abundantly clear on this appeal it is that the Respondent does not advocate or seek any ruling from this Court which would limit the traditional and precious right of jury trial. It is the Respondent's position that that right has been carefully, even jealously preserved to Beacon Theatres in the present case.

Respondent further recognizes that notwithstanding the discretion conferred upon the trial courts by the Federal Rules to separate issues (see *United States v. Yellow Cab Co.*, 340 U. S. 543, 555, 71 S. Ct. 399, 95 L. Ed. 523, 533) and to direct the order of trial that discretion cannot be completely untrammelled in the face of the Seventh Amendment and the mandate of Rule 38(a).

The proper bounds of that discretion can best be illustrated by considering two district court decisions. In *Blechman, Inc. v. Kleinert Rubber Co.* (D. C. N. Y.), 98 Fed. Supp. 1005, an antitrust complaint was filed seeking

both money damages and an injunction against continuing violation (similar to *Ring v. Spina* (C. A. 2), 166 F. 2d 546). Judge Kaufman held that plaintiff could not be deprived of a jury trial on the legal issues but held, page 1006:

> "However, neither the Federal Rules nor the Seventh Amendment to the Constitution requires that the issue as to plaintiffs' right to injunctive relief because of defendants' alleged violation of the antitrust laws be tried by a jury. Whether or not this question should be separately tried by the court, and, if so, whether or not it should be tried before the legal issues, are questions not presented by the instant motion, and are matters within the discretion of the trial judge. 2 Barron and Holtzoff, Federal Practice and Proceduce §894 (1950)."

It may well be that the case goes too far in intimating that the trial judge has complete discretion to separate the issues and to try the equity phase first without a jury where from all that appears that judgment would be determinative of the entire case. The right to jury trial on the legal issue of violation of the antitrust laws and damages sustained therefrom could thus be completely nullified. We are more disposed to agree with *Sablosky v. Paramount Film Distributing Corp.* (D. C. Pa.), 13 F. R. D. 138, with the observation, however, that in each case, as in *Ring v. Spina, supra,* the joinder of legal and equitable issues was in the same pleading (complaint for damages and injunction) and in each the determination of the one issue would be completely determinative of the other.

In the case at bar we have a plaintiff pleading and becoming entitled to equitable relief at the hand of the Chancellor and a defendant filing a legal counterclaim upon a

wholly diverse and infinitely broader claim wherein the determination of the equitable issue is in no sense determinative of or a defense to the legal counterclaim. In such a case the trial court should not be without discretion to permit plaintiff to proceed with its claim for equitable relief unhampered by the delay and prejudice which would flow from a compulsory submission to all issues to a jury. We think the distinction between the two lines of cases, which is implicit in *American Life Ins. Co. v. Stewart, supra,* is real and should be recognized.

In short, the only situations in which there is real justification for holding the trial court's discretion limited by the Seventh Amendment and by Rule 38(a) are those wherein legal and equitable issues are joined in the same pleading and the determination of one would be determinative of the other and in the true "juxtaposition of the parties" cases where the complaint in equity is no more than an anticipatory defense to the counterclaim at law.

A third district court decision points up the true line of demarcation: In *Martin v. Wyeth, Inc.* (D. C. Md.), 96 Fed. Supp. 689, suit was brought for patent infringement, breach of confidential relations and wrongful appropriation of invention. The defendant filed a counterclaim for damages for the dissemination by plaintiff to the trade of a circular which was defamatory and damaging to it with respect to its business practices and products. Judge Chesnut in separating the issues of the counterclaim observed, page 697:

> "The subject matter presents questions of law which are so different from and unrelated to those involved in the patent case that it seemed to me inadvisable to possibly tend to blunt the sharp focus of attention on the dominant question by contemporaneous consideration of such a different subject matter.

> Therefore a further hearing on the issue raised b the counterclaim will be postponed to a later tim when counsel desire to bring it on for adjudication."

This was the procedure adopted by Judge Byers in th *Smith, Kline & French Laboratory* case, *supra,* and b Judge Bard in *Society of European Stage Authors v. WCAU, supra,* where an action for copyright infringe ment met with a counterclaim of antitrust violation. Th court said (35 Fed. Supp. 461):

> "As to whether there shall be separate trials an separate judgments rests in the sound discretion of th trial judge, and the determining factors are the doing of justice, the avoidance of prejudice, and the fur therance of convenience. Seagram-Distillers Corpo ration v. Manos, D.C., 25 F. Supp. 233. There being nothing to compel a joint trial of the separate issues I am constrained, by reason, to agree with the plain tiff that the convenience and fairness of separat trials warrant separation.
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> * * * * * * * * *
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> "By granting separate trials delay will be avoide and the claim set forth in this complaint can be trie on November 13th as listed. To prevent further dela will be doing justice in accord with the spirit of th Rules of Civil Procedure."

Petitioner's Decisions Are Inapt Here.

If we understand Point B of Petitioner's Brief[17] it i that the complaint at bar fails to state a claim for equit

[17]Without wishing to be critical, we encounter some difficult because the statement attributed to the court in *Eastern Petroleum Co. v. Asiatic Petroleum Co.* (C. A. 2), 103 F. 2d 315 (Br. p. 26) cannot be found in the decision and the statement of Judge Learne Hand in *Leach v. Ross Heater & Mfg. Co.* (C. A. 2), 104 F. 2d 88 (Br. p. 29) turns out to be in a dissent in a case furnishing clea support for the maintenance of the present action.

able relief because it fails to allege that Beacon Theatres' threats of suit were only spurious. What the complaint alleges, of course, is threats by Petitioner that if Fox' California Theatre were granted a prior run or clearance over the drive-in Petitioner would sue for treble damages under Section 4 of the Clayton Act (15 U. S. C., Sec. 15) and that these threats of litigation "threaten to and have in fact deprived plaintiff and its said California Theatre of the right to negotiate for motion pictures of their first run in the San Bernardino area" [R. 18]. The complaint may not be a model of pleading, as observed by the Court of Appeal, but we suggest that it adequately alleges a wrongful interference with plaintiff's business relations by threats of litigation addressed to plaintiff and its customers.

Kidd v. Horry, 28 Fed. 773, stands for no more than the proposition that equity will not enjoin the publication of a business libel and it is distinguished upon this very ground in *Emack v. Kane*, 34 Fed. 46, 50, also cited in Petitioner's Brief (p. 29). The distinction is made the subject of an annotation in 148 A. L. R. 853 which points out that while a trade libel *per se* may not be enjoined, if it is coupled with other grounds for equitable relief, such as coercion upon plaintiff's customers not to deal, an injunction will lie. See cases commencing page 861.

The statement in footnote 13 on page 30 of Petitioner's Brief to the effect that Fox West Coast could not have suffered any injury when it filed its complaint because Petitioner's drive-in had not yet opened overlooks the fact that licenses for the exhibition of motion pictures are negotiated weeks before the picture is exhibited (thus note advance advertising done by a theatre of "coming attractions"). Moreover, the plaintiff alleged that Petitioner's threats of litigation *threatened* to deprive it and had de-

prived it of the right to negotiate for first run pictures with clearance over the drive-in [R. 18]. It is hornbook that:

> "Threatened irreparable injury is one of the grounds for issuance of the writ of injunction. Where a continued use or threatened danger is such as to cause reasonable fear of irreparable injury, it is not essential that there be actual damage, or even a completed violation of the plaintiff's rights, in order to entitle him to the protection of equity." (19 Am. Jur. "Equity" 529, p. 56.)
>
> *Hitchman Coal & Coke Co. v. Mitchell,* 245 U. S. 229, 38 S. Ct. 65, 62 L. Ed. 260.

Conclusion.

The basic fault with Petitioner's position before this court can best be demonstrated by taking a sentence out of its Brief. On page 35 it is said:

> "The decision in the Beacon case now holds that this right to jury trial is lost; that *if the court determines to try the antitrust issues under the equitable claim for an injunction first* that Rule 42b provides the source of such power even though the effect is to destroy the right to jury trial * * *".

Certainly, if the Respondent Judge were to try the antitrust issues under the complaint for equitable and declaratory relief the doctrine of *res judicata* would effectively deprive Petitioner of its right to a jury on its counterclaim. But there are no antitrust issues raised in the complaint and when Beacon Theatres sought to inject them in its answer [R. 30-33] the Respondent struck that portion of the pleading to abide the trial of the antitrust counterclaim before a jury [R. 52].

Respondent in his Response to the Order to Show Cause correctly analyzed the case when he stated:

"(1) Under the Seventh amendment to the Constitution the right to trial by jury does not exist with respect to the issues raised by plaintiff's complaint in said action for the reasons:

"(a) the allegations of said complaint present a case cognizable in equity in that plaintiff has alleged that defendant has interfered with plaintiff's right to negotiate for clearance in favor of its theatre over those competitive to it and that plaintiff is without any speedy or adequate remedy at law and that it will be irreparably harmed unless an injunction is issued. Respondent has not, as averred in Paragraphs IX and X of the Petition for Writ of Mandamus herein, denied a jury trial on the issues presented by said complaint for the reason that an action for declaratory relief is per se an action in equity, but for the reason that the complaint contains allegations sounding in equity and prays for equitable relief. Monetary damages are nowhere sought in said complaint;

"(b) an action to determine whether two theatres are in competition and whether clearance may be granted was unknown to the common law and has its genesis not in the common law but in part at least in the decree of the court of equity in *United States v. Paramount* (66 Fed. Supp. 323, 342—'The decision of such controversies as may arise over clearance should be left to local suits in the area concerned * * *').

(2) Respondent has not and does not propose to deny to defendant a jury trial upon the legal issues presented by its Cross-Claim" [R. 67-68].

Whatever might be the disposition of this court to limit the discretion given to the trial court by the Rules to separate issues and to determine the order of trial when the right to a jury trial is demanded, this case does not present the question for determination for the simple reason that deprivation of a jury trial on any of the substantive issues of the antitrust counterclaim just cannot be demonstrated except by the type of reckless statement quoted above.

We have shown, we hope beyond further question, that a judicial determination of whether two theatres are sufficiently competitive to justify either in seeking to negotiate for a prior run with clearance over the other, whichever way the question is determined, will be determinative of no material issue raised by the charges of antitrust violation.

For the reasons stated the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

"Interlocutory Appeals Act" P L 85-919—to amend §1292 of 28 U.S.C.—Sept. 2, 1958

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days of the entry of such order. Provided, however, that an application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."